

Date: June 23, 2015

From: Mike Denker, 203 Union Street, Haines, AK 99827

To: Members of the Haines Borough Assembly

Re: Public Comments: Citizen appeal to discontinue use of the Haines Borough policy regarding agendas.

Thank you madam Mayor, and members of the Assembly.

INTRODUCTION

Tonight I would like to comment on item 9B1 on the agenda: *GAS committee report – Agenda Preparation Code vs. Policy*. I will argue that the borough policy regarding agendas¹ violates the First² and Fourteenth Amendments³ of the United States Constitution, as well as the Petition Clause of the Alaska Constitution⁴. Two main points support this contention.

1. The borough policy allows the mayor and manager to abridge a person's First Amendment right to petition the Assembly.
2. The Borough does not have the sufficient justification to abridge a person of their First Amendment right to petition the Assembly.

As such, I ask that this argument be posted for the public, and that the borough respond "point-by-point" so that the public can be presented with both sides of the argument. I also

¹ *Haines, Alaska, Agenda Request for Assembly Action*, form notes. "Placement on a borough assembly agenda is not guaranteed. In a manager form of government, some matters are not within the assembly's purview and are more appropriately handled by staff. Your request will be referred to the borough manager and mayor and may require legal review and / or more information before a determination can be made. You will be contacted and informed of the best and most appropriate avenue for action. If your request ends up on an assembly agenda, it will most generally be placed under "Correspondence / Requests" and is subject to all necessary paperwork being submitted in a timely manner. The deadline for agenda topics is 10:00am the Monday (one week and one day) prior to an assembly meeting. Please be aware that we may ask for additional supportive and / or background information in order to assist the assembly in making an informed decision. The clerk will provide copies for them." (Herein: *Policy*)

² *U.S. Constitution, Amendment I*, "Congress shall make no law...abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." (Herein: *U.S. Const., Amend. I*)

³ *U.S. Constitution, Amendment XIV, Section 1*, "...nor shall any State deprive any person of life, liberty, or property, without due process of law."

⁴ *Alaska Constitution, Art. 1, Sec. 6*, "The right of the people...to petition the government shall never be abridged." (Herein: *Alaska Const., Art. 1, Sec. 6*)

ask that Code regarding agendas be followed so the public's right to petition the Assembly will be protected.

ARGUMENT

1. The borough policy allows the mayor and manager to abridge a person's First Amendment right to petition the Assembly.

The borough policy regarding agendas states, "placement on a borough assembly agenda is not guaranteed."⁵ The policy allows the mayor and manager to withhold a person's written request from an agenda and meeting packet.⁶

Black's Law Dictionary defines a "petition" as a "a formal written request to some government authority".^{7 8} A person's right to *petition* the Assembly, and have that *petition* "heard" by the Assembly and the public⁹, is guaranteed by the First Amendment of the U.S. Constitution.¹⁰ Additionally, the Alaska Constitution states, "a person's right to petition the government...shall never be abridged."¹¹

Allowing the mayor and manager to screen a petition for content and withhold it from an agenda and meeting packet abridges this First Amendment right. Screening a petition and withholding it from an agenda and meeting packet constitutes a ***content-based***¹² infringement of a ***protected form of political expression***¹³. This also imposes a

⁵ See *Policy*.

⁶ *Id.*

⁷ "***Petition***" (def.), from *Black's Law Dictionary, Sixth Edition, 1990*, "A written address, embodying an application or prayer from the person or persons preferring it, to the power, body, or person to whom it is presented, for the exercise of his or their authority in the redress of some wrong, or the grant of some favor, privilege, or license. A formal written request addressed to some government authority. The right of the people to petition for redress of grievances is guaranteed by the First Amendment, U.S. Constitution."

⁸ "***Formal***" (def.), from *Merriam-webster.com*, "following or according with established form, custom, or rule; done in due or lawful form."

⁹ See *Alaska Statute § 44.62.312 (a)(5)*, "the people's right to remain informed shall be protected so that they may retain control over the instruments they have created." Thus, the people have a right to "hear" the petitions of fellow citizens so they may remain informed regarding matters of public interest.

¹⁰ See *U.S. Const., Amend. I*.

¹¹ See *Alaska Const., Art. 1, Sec. 6*.

¹² *Emanuel, Steven L., Emanuel Law Outlines – Constitutional Law, Thirty-first Edition, Wolters Kluwer, 2013*, Pg. 499. Protected expression is "All expression not falling into one of these five categories: "(1) obscenity; (2) fraudulent misrepresentation; (3) defamation; (4) advocacy of imminent lawless behavior; and (5) fighting words." "If expression is protected, then any government ban or restriction on it based on content is ***presumed to be unconstitutional***. The Court subjects any such regulation to ***strict scrutiny*** – the regulation will be sustained only if it (1) serves a ***compelling governmental objective***; and

“**prior restraint**” on a **protected form of political expression** by denying the use of a public forum before an audience receives the information.^{14 15 16} The Supreme Court has ruled that **content-based** infringements and **prior restraints** abridge a person’s First Amendment rights.¹⁷

2. The borough does not have the sufficient justification to abridge a person of the First Amendment right to petition the Assembly.

The Fourteenth Amendment guarantees that a person will not be deprived of a fundamental right “without due process of law.”¹⁸ Both the First and Fourteenth Amendments require sufficient justification to abridge a person of the fundamental right to petition the government.^{19 20} Thus, in this instance, the burden is on the borough to prove

(2) and is ‘**necessary**’, i.e., drawn as **narrowly as possible** to achieve that objective.” (Emphasis: Emanuel) (Herein: *Emanuel*)

¹³ *Id.*

¹⁴ *Black’s Law Dictionary, Sixth Edition, 1990*, “**prior restraint**” (def.), “A system of ‘prior restraint’ is any scheme which gives public officials the power to deny use of a forum in advance of its actual expression...Any system of prior restraints of expression bears a heavy presumption against its constitutional validity, and the Government carries a heavy burden of showing justification for imposition of such restraint...Prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment Rights...Three exceptions are recognized: a publication creating a ‘clear and present danger’ to the country, *Schenck v. U.S.*, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470; Obscene publications, and publications which invade the zone of privacy.”

¹⁵ *Chemerinsky, Erwin, Constitutional Law – Principles and Policies, Fourth Edition, Wolters Kluwer, 2011*, Pg. 978. “The clearest definition of prior restraint is an administrative system or a judicial order that prevents speech from occurring.”

¹⁶ *Galloway, Russell W., Basic Free Speech Analysis, Santa Clara Law Review, Volume 31 | Number 4, Article 2, January 1, 1991*, Pg. 910, Footnote 258. (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989), and (quoting *Southeast Promotions v. Conrad*, 420 U.S. 546, 553 (1975)), “The regulations we have found invalid as prior restraints have ‘had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.’...The relevant question is whether the challenged regulation *authorizes* suppression in advance of its expression...”. (Emphasis: *Ward*) (Herein: *Galloway*)

¹⁷ See *Emanuel*. See also *Chemerinsky*. See also *Galloway*.

¹⁸ See *U.S. Const., Amend. XIV, Sec. 1*.

¹⁹ *Emanuel, Steven L., Emanuel Law Outlines – Constitutional Law, Thirty-first Edition, Wolters Kluwer, 2013*, Pg. 499. Protected expression is “All expression not falling into one of these five categories: “(1) obscenity; (2) fraudulent misrepresentation; (3) defamation; (4) advocacy of imminent lawless behavior; and (5) fighting words.” “If expression is protected, then any government ban or restriction on it based on content is **presumed to be unconstitutional**. The Court subjects any such regulation to **strict scrutiny** – the regulation will be sustained only if it (1) serves a **compelling governmental objective**; and

the actions authorized by the policy are “*necessary to further a compelling government interest*”.²¹

Unfortunately, the borough’s justifications for using the policy are less than compelling. Screening a person’s petition is unnecessary. Following the Code²² allows the Assembly to decide if enough information is provided, or if a matter “is within the Assembly’s purview”²³. Thus, following the Code protects a person’s First Amendment rights, while policy does not.

CONCLUSION

I am certain the members of the Assembly want the public to remain informed. As such, I ask the Assembly to direct staff to post this argument for the public. I also request the Assembly direct the manager to publically respond to this argument “*point-by-point*” so that the public can be presented with both sides of the argument.

Thank you Madam Mayor. I wish to submit this for the public record.

Respectfully,

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(2) and is ‘*necessary*’, i.e., drawn as *narrowly as possible* to achieve that objective.”
(Emphasis: Emanuel) (Herein: *Emanuel*)

²⁰ *Chemerinsky, Erwin, Constitutional Law – Principles and Policies, Fourth Edition, Wolters Kluwer, 2011, Pg. 558.* “Substantive due process, as that phrase connotes, asks whether the government has an adequate reason for taking away a person’s life, liberty, or property. In other words, ***substantive due process looks to whether there is a sufficient justification for the government’s action.*** [i]f it is in an area where strict scrutiny is used, such as for protecting fundamental rights, then the government will meet substantive due process only if it can prove that the law is necessary to achieve a compelling government purpose.”
(emphasis the authors)

²¹ See *Emanuel*, Pg. 499. See also *Chemerinsky*, Pg. 558.

²² See *Haines, Alaska, Borough Code § 2.10.030 (A)*. “All reports, communications, ordinances, resolutions, contract documents, or other matters to be submitted to the assembly shall be delivered to the clerk by the deadlines stipulated in the current assembly-approved agenda preparation schedule. The mayor, with assistance from the clerk, shall arrange a list of such matters according to the order of business and the clerk shall furnish each member of the assembly, the mayor, manager and chief fiscal officer with a copy of the same in packet form five calendar days in advance of the assembly meeting. Packets may also be prepared as necessary for other officers, department heads, and members of the press or other interested parties.”

²³ See *Policy*.